IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 654

SIDMON McHIE and HAMMOND REALTY COMPANY, a corporation,

Petitioners,

vs.

THE FIFTH AVENUE BANK OF NEW YORK, Executor of the Last Will and Testament of Isabel D. McHie,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONERS' REPLY BRIEF SUPPORTING PETITION FOR CERTIORARI.

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I.

Elementary Indiana Decisions on Contract Law Violated.

Respondent emphasizes the controlling importance of Indiana decisions. It quotes the following recent decision of this Court holding that Circuit Courts of Appeals are *bound to follow state decisions* on questions of non-federal law, and that conflict between a Circuit Court of Appeals'

decision and the state decisions *assumes a new importance* as reason for granting certiorari, since the decision in *Erie R. Co.* v. *Tompkins,* 304 U. S. 64:

> "The Rules indicate that the Court *will be persuaded* to grant certiorari where a circuit court of appeals has decided an important question of *local law* in a way *probably in conflict with applicable local decisions.*"
>
> *Ruhlin* v. *New York Life Ins. Co.* (1938), 304 U. S. 202, 206; 58 S. Ct. 860, 861.
>
> Respondent's Brief, 9.

But respondent argues against itself when it takes refuge in the Indiana law. *The petition for certiorari is grounded primarily on Indiana decisions* on every point. The Circuit Court of Appeals' violation of Indiana law is very serious on (1) law of contracts, and (2) law forbidding an appellant trustee to serve two masters during the appeal.

The Indiana contract decisions violated are set forth in the petition, page 13, as follows:

> "An accord cannot constitute a bar * * * unless shown to have been *fully* executed * * * Upon the failure (to fully perform) * * * they were *remitted* to their *original rights* * * * as if the accord had never been agreed upon."
>
> *Jackson* v. *Olmstead* (1882), 87 Ind. 92, 94.
>
> *Kingan* v. *Gibson* (1870), 33 Ind. 53, 54, top.
>
> *Demeese* v. *Check* (1871), 35 Ind. 514.
>
> *Woodruff* v. *Dobbins* (1845), 7 Blackford (Ind.) 582.

The *principle* announced in the above Indiana cases is *elementary* and is also announced by decisions of this Court, the federal courts, and such recognized texts as *Williston on Contracts* and *Restatement of the Law of Contracts.* (Petition 14, 15.)

There can be no doubt that the 1926 agreement was an "accord" contract within the above quoted Indiana rule. Accord is synonymous with "settlement." (1 C. J. S. page 464, par. 4.) The 1926 agreement calls itself a "settlement." (R. 27, top.) The opinion calls it a "settlement." (R. 174, top.) And the agreement purports on its face to be a settlement of all property and personal rights between the parties. Nor is it any less an accord because it covers *personal* rights, such as the right not to be molested or annoyed:

> "All claims *relating to the person* or personal property may be the subject of an *accord* and satisfaction * * *."
>
> 1 Am. Jur. page 217, sec. 5.

Respondent's brief admits that the right to be let alone was *one of the material considerations* of the 1926 agreement. The brief says:

> "The *true considerations* for the 1926 separation agreement were as follows: * * * (d) their mutual desire to live apart and separate."
>
> Respondent's Brief, page 11, bottom.

The above admission brings respondent squarely in conflict with the above quoted Indiana decisions which hold that any material breach of the accord "remits" the parties to their "original rights."

Also, the above admission of respondent is squarely in line with the District Court's finding that:

> "Paragraph 6 of said Separation Agreement, which reads as follows: 'It is agreed that the parties shall live apart and separate and shall not annoy and molest each other,' *constituted one of the true considerations* for said Agreement.
>
> "One of the several considerations *for which counterclaimant in fact executed the contract* of March

> 22nd, 1926, which is one of the above-mentioned exhibits, was a covenant by said decedent that she 'shall not annoy or molest' him. Said decedent continuously, completely and flagrantly breached said covenant from the time it was made down to the time of her death, by continuously and *maliciously* annoying and molesting him during that entire period. *Said consideration had completely failed* at the time of decedent's death."
>
> R. 120, bottom.

Moreover, the Circuit Court of Appeals admitted the correctness of the above finding of fact but concluded in law that Mrs. McHie's breach did not operate to remit McHie to his original rights.

R. 173, bottom.

A mere comparison of the rule above quoted from the Indiana decisions, with respondent's admission, suffices to show that the Circuit Court of Appeals' decision is "probably in conflict with applicable local decisions." (Rule 38.)

This Is Primarily a Contract Case,—Not a Domestic Relations Case, as The Opinion and Respondent's Brief Erroneously Imply. The Opinion Cites Only Domestic Relations Cases.

Both the opinion and respondent's brief commit the fundamental error of seizing on a non-controlling *circumstance* in this case while ignoring the controlling *principles* of contract law. They search around in the obscure corners of the law until they find two cases containing a covenant "not to molest" and then they rest the decision on those cases,—oblivious to the fact that the *questions* involved were entirely different. The only re-

semblance of those cases to the one at bar is that they contain the word "molest." For instance:

> *Hughes* v. *Burke* (1934), 167 Ind. 472; 175 Atl. 335, 337, was where a wrongdoing husband abandoned his wife and children, after which he contracted to support them. Held, that the wife's alleged molestation of him was "independent" of his duty to support.
>
> *Sabbarese* v. *Sabbarese* (1929), 104 N. J. Eq. 600; 146 Atl. 592, is primarily an *adultery* case. It contains a *dictum* to the effect that the wife's molestation of the husband would not be a defense to an action on contract for support money.

The Circuit Court of Appeals' opinion decides the contract phase of this case *entirely* on the above two *domestic relations* cases from *Maryland* and *New Jersey.* Nor is the opinion aided by respondent's additional citations of an old English *adultery* case (*Fearan* v. *Earl of Aylesford,* 14 Q. B. Div. 792), and two other New Jersey cases involving support money payments for wife and children. (*Stern* v. *Stern,* 112 N. J. Eq. 8; *Moller* v. *Moller,* 188 Atl. 505.) Even on domestic relations law, the opinion has somehow chosen the minority rule, the majority being contra. (Petition, 20, top.)

The controlling question in our case is not in the field of domestic relations but contract. This is illustrated by the fact that this same question could arise between parties not married and it could grow out of some other kind of accord than a separation agreement. For instance:

Suppose a contract for mutual wills had been made in 1919 between brother and sister, between parent and child, or between business associates. Suppose in 1926 they made an accord (settlement) contract giving up their original contract rights, after which one of them maliciously and continually breached one of the accord cove-

nants so as to produce a failure of one of the "true considerations" of the accord. Then the wrongdoer dies. Is the survivor entitled to be "remitted" to his "original rights" under the Indiana cases above cited?

Accordingly, the opinion and respondent's brief let the tail wag the dog, and they arrive at the highly unsound result of deciding McHie's rights to a $250,000.00 estate under the 1919 will contract on the sole authority of two *adultery* and *support money* cases from other states, oblivious to the contract questions involved and the Indiana contract decisions governing. This is apparent from respondent's argument at page 12, where, after citing these domestic relations cases, respondent criticizes us for failing to cite a case "on similar facts." Then respondent dismisses our Indiana decisions on accord contracts with a wave of the hand saying merely: "Those cases have no bearing on the instant case and are of no assistance to them (petitioners) in this Court." (Brief, 12.)

Actually, it appears that the "independent covenant" doctrine has no place in the law of accord, under the above cited Indiana cases holding that all material covenants of an accord must be fully performed and none can be breached with impunity. (Petition, 13-15.) But anyhow, the covenant against molestation certainly was not "independent," so that it could be breached without affecting the accord, in view of respondent's above quoted *admission* that this covenant was one of the "true considerations" of the accord, and in view of the District Court's finding to the same effect (R. 121, top), which fact was not challenged in the opinion.

While it is sufficient for us to show that the decision violates the Indiana law on accords, it also violates the

broader contract principle that one party (McHie) should not be held to his promise to give up her estate when she breached one of her material promises—particularly when her breach was *malicious*. This broader principle is summarized in the following text and confirmed by the following Indiana decisions:

> "* * * one party should not be required to perform if the other does not. The latter principle, like the excuses based on fraud, duress or mistake, is founded on concepts of justice, and is imposed by law although there may be no reason to suppose that the question that has arisen was within the contemplation of the parties."
>
> Restatement of Law of Contracts (1932 Perm. Ed.), Sec. 274, at page 400. Also Secs. 270, 275, 314, 318.

To like effect, see:

Board of Commissioners v. *South Bend Ry. Co.* (1888), 118 Ind. 68, 79; 20 N. E. 499.

Jeffries v. *Lamb* (1880), 73 Ind. 202.

Coe v. *Smith* (1848), 1 Ind. 267.

Respondent's brief is significantly silent on the following important contract points made in the petition:

(1) Respondent *cites no Indiana contract case* to show what it contends the applicable law *is*, though it asserts that Indiana law controls. In a state as old as Indiana, this Court might expect respondent to find a decision to support its contention on an elementary contract principle. Instead, respondent cites more adultery and support money cases from England and New Jersey.

(2) Respondent does not answer the important point that the opening part of the 1926 agreement *recites the moving cause* of the agreement to be the

personal consideration of not being molested or annoyed,—to avoid previous "friction" and to promote their "comfort, health and happiness." (R. 27, top. Petition, 15, bottom.)

(3) Respondent does not deny the obvious point that *the opinion is self-contradictory.* The opinion holds the Sixth Covenant against molestation to be *dependent* for the purpose of condoning Mrs. McHie's breach of it (saying her breach was "caused" by McHie's failure to pay money under other covenants), after which the opinion turns around in the next sentence and holds the Sixth Covenant to be "independent" for the purpose of depriving McHie of the relief which the District Court granted him. (R. 174, top.) The only answer made by respondent is to say that the language in question "was simply an *observation* made by the court and did not constitute the reason for the decision," but respondent does not deny its conflicting character. It is impossible to segregate *two adjoining sentences* in an opinion and to say that one is "observation" and the other is "reason." Actually the two conflicting statements are part and parcel of the opinion and they confuse the contract law of Indiana, besides violating it.

It is important to observe that the District Court, which presumably is most familiar with the local law of its own state, stated its conclusions of law and decree in favor of McHie (R. 121, 122).

Strong reason exists for believing that McHie has been deprived of the contract law of Indiana as granted him by the District Court in Indiana, because of a decision of the learned Circuit Court of Appeals which

ignores the contract law of his state and goes off on a tangent in the domestic relations law of New Jersey and Maryland. Petitioners respectfully submit that this merits investigation by this Court,—particularly in view of this Court's recent decisions confining the Circuit Court of Appeals to Indiana law.

II.

Decisions of Indiana and of This Court Which Forbid Enforcement of Judgment During Appeal, Violated.

Respondent is significantly silent on the following crucial points in section II, pages 20-23 of the petition:

(1) Respondent does not deny our charge that it pretended to serve two masters during appeal—pretended to collect a trust asset *for McHie's benefit* in the District Court while seeking to take the ownership of this asset away from him on appeal. Nor does respondent deny our quotation of its *admission* in the Circuit Court of Appeals that it was so doing. (Petition, 20, bottom.)

Instead, respondent's brief (13, bottom), like the opinion (R. 170, bottom), seeks to excuse this enforcement by stating that the judgment had become final as against the judgment debtor, Hammond Realty Company. But that misses the point. Whether this trust asset took the *form* of a final judgment or some other form, respondent had no business collecting it for *McHie's benefit* under the District Court's decree, while appealing against McHie and seeking to *change the ownership* of the asset which was part of the *subject matter of the appeal.*

(2) This last mentioned conduct of respondent violates the very decisions of this Court which are cited in respondent's brief, page 14. Those cases hold that waiver of appeal will result "from conduct which is *inconsistent* with the claim of a right to reverse the judgment or decree." (Citation, *infra.*) Here, the District Court's decree, binding until reversed, made respondent a *trustee* for McHie of this entire estate, *including* this $10,000.00 money judgment against Hammond Realty Company. While *choosing* (it was not compulsory during appeal) to *collect* this trust asset for McHie's benefit in the District Court, respondent sought on appeal to take the asset away from McHie—dealing with the *subject matter of the appeal* for two conflicting masters—McHie below and Mrs. McHie's legatees above. Respondent's own cases say that the only time an appellant can collect part of the judgment below without waiving the appeal is when:

> "The amount awarded, paid, and accepted (below) *constitutes no part* of *what* is in controversy" (above).
>
> *Gilfillan* v. *McKee* (1895), 159 U. S. 303; 16 S. Ct. 6, 9, 2nd column.
>
> *Embry* v. *Palmer* (1883), 107 U. S. 3; 2 S. Ct. 25, 29, bottom.

(3) Respondent's brief is silent on our charge that its conduct of collecting this trust asset for the *benefit* of the *decreed* beneficiary, McHie, falls within the condemnation of the very Indiana decision cited in the opinion, and in respondent's brief, to justify the conduct. That decision says that Indiana law is:

> "declaratory of the common law rule that *a party cannot accept the benefit* of an adjudication and yet allege it to be erroneous." (R. 171.)
>
> *State ex rel. Jackson* v. *Middleton* (1938), 215 Ind. 219, 224; 19 N. E. (2d) 470, 472.

(4) Respondent's brief is likewise silent on the other highly pertinent Indiana decisions cited in the petition, holding that waiver of appeal results from enforcement below, even though the enforced part of the decree is *not controverted.* (Petition, 21.) Nor does the brief deny our point that this rule is applicable to trustee appellants, both under Indiana and federal decisions. (Petition, 22.)

So, whether waiver of appeal be considered a question of Indiana or federal law, the opinion violates both by permitting respondent's anomalous conduct, so plainly admitted by its pleading in the Circuit Court of Appeals. (Petition, 20, bottom; R. 164, par. 4.)

III.

This Court Is Not Required To Review The Indiana Divorce Law, Because That Question Is Expressly Excluded From The Circuit Court Of Appeals' Decision.

The District Court in Indiana, which presumably is most familiar with the strictly local divorce laws of its own state, ruled against respondent's contention regarding the effect of the Indiana divorce decree of the McHies, by stating general conclusions of law and decree against respondent. (R. 121, 122.)

The Circuit Court of Appeals did not disturb the District Court's ruling on divorce but expressly *excluded* the divorce question from its decision, saying:

> "*We put to one side* the effect the *divorce decree* had upon the property rights of the McHies, and we shall examine the *covenants* of the contract of March 22nd, 1926, * * *."
>
> Opinion: R. 173, bottom.

This Court will not review questions not considered by the Circuit Court of Appeals—particularly not local questions such as divorce. The only excuse for asking this Court to review an Indiana divorce question would be if the Circuit Court of Appeals had *decided* the divorce question contrary to Indiana decisions. Respondent invites this Court voluntarily to invade the Indiana divorce field by speculating that the Circuit Court of Appeals "could also have reached the same result" if it had gone into the divorce question. This Court will not do so:

Montana Ry. Co. v. *Warren* (1890), 137 U. S. 348, 34 L. Ed. 681, 11 S. Ct. 96, 2nd column;

Charles Warner Co. v. *Independent Pier Co.* (1928), 278 U. S. 85, 91, 49 S. Ct. 45, 46.

But if the divorce case be reviewed it will be found that the divorce decree does not aid respondent because:

(1) The present record shows that in the District Court respondent *waived* any right to set up the 1936 divorce decree as adjudicating all prior contract rights of the parties, because respondent's complaint in the District Court sued McHie upon a 1933 guaranty contract which he gave to Mrs. McHie. In other words, *respondent itself went behind the divorce decree by suing on a contract predating the divorce.*

R. 2, bottom.

R. 7, bottom.

Besides suing on the 1933 guaranty in its complaint, respondent's motion for summary judgment further sets up a whole series of transactions between Mr. and Mrs. McHie from 1928 to 1933, all of which preceded the 1936 divorce decree.

R. 34, 35.

R. 48-57.

Such voluntary pleading in the District Court *waives* respondent's present contention about the 1936 divorce decree being *res adjudicata* of prior contract rights of the parties.

> "It is nevertheless a general rule that a party entitled to claim the benefit of a *former judgment* may waive or estop himself from asserting such right. So where a party * * * *voluntarily opens an investigation* of the matters which he might claim to be concluded by it, or makes an admission of record inconsistent with the former judgment, he will be held to have waived the benefit of the estoppel (of the former judgment), and the *case may be determined as if no such former judgment had been rendered.*"
>
> 34 C. J. 749, Sec. 1161.

> "Proceedings taken which are *inconsistent* with the error alleged will be considered as *waiving* such error."
>
> 5 C. J. S., page 1234, Sec. 1804.
>
> *Mack* v. *Levy,* 60 Fed. 751, appeal dismissed, 154 U. S. 508.

(2) The general language which respondent quotes from the divorce decree has no bearing on the present case because *the 1919 will contract was not placed in issue* or even mentioned in the divorce complaint (R. 64), nor in the divorce answer (R. 71). The Indiana law is very clear that a decree must be read in the light of the issues and *a matter not pleaded is not adjudged* in Indiana, no matter how broad the language of the decree. This rule has been specifically applied to divorce cases:

> "No question of law is better settled than that a judgment which a court attempts to render *upon an issue which is not presented* is a *nullity.*"
>
> *Moore* v. *Moore* (1922), 81 Ind. App. 169, 173 (bottom). Divorce case. Transfer denied by Indiana Supreme Court (see heading), 81 Ind. App. 169.
>
> *Boardman* v. *Griffin,* 52 Ind. 101, 106 (middle).

This Court will not decline to review a decision which conflicts with Indiana contract decisions, and which conflicts with both Indiana's and this Court's decisions on waiver of appeal, and which even conflicts with *itself* on the independent covenant doctrine,—simply because respondent argues (erroneously) that the court "could have reached the same result" by going into Indiana divorce laws.

CONCLUSION.

Respondent's silence on crucial charges in the petition, and its failure to cite any Indiana contract cases, supports our contention that the District Court correctly applied the law of its own state when it decided for McHie, and that:

(1) The Circuit Court of Appeals' decision conflicts with Indiana decisions since 1845 on contract law;

(2) The decision conflicts with both Indiana's and this Court's decisions on waiver of appeal, and establishes the novel and dangerous doctrine that a trustee appellant can serve two conflicting masters during the appeal.

(3) The opinion conflicts with itself on the independent covenant doctrine, by making the same covenant dependent for one party and independent for the other.

Therefore, each petitioner respectfully submits that the Petition for Writ of Certiorari should be granted.

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